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Neutral Citation No. [2024] EWCA Crim 99

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/02300/B3

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 1st February 2024

B e f o r e:

LORD JUSTICE DINGEMANS

MR JUSTICE JAY

THE RECORDER OF REDBRIDGE
(Her Honour Judge Rosa Dean)
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

W H D

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Miss M Stevens appeared on behalf of the Appellant

Miss S Gates appeared on behalf of the Crown

J U D G M E N T

LORD JUSTICE DINGEMANS:

Introduction

1. On 6th August 2018, in the Crown Court at Newport, the appellant, then aged 49, pleaded guilty to a number of sexual offences committed against his daughters and their cousin. On 7th September 2018 he was sentenced by His Honour Judge Tim Mousley KC to a total of 13 years and six months' imprisonment. A victim surcharge of £170 was ordered, and we will return to the issue of the victim surcharge at the end of this judgment.

2. The victims of the offending have the benefit of lifelong anonymity pursuant to the provisions of the Sexual Offences (Amendment) Act 1992. The appellant's name has been given random initials in order to preserve the anonymity of the victims.

3. The appellant appeals against his sentence by leave of the single judge. The appellant seeks leave to rely on fresh expert evidence which raises the issue of whether the appellant's responsibility for his offending was reduced by post traumatic stress disorder ("PTSD"), which has occurred since he left the armed forces in 1996, on the basis that it was a significant contributing factor to his offending. The fresh expert evidence on which the appellant seeks leave to rely is from Dr Marc Desautels, a Chartered Clinical Psychologist, in the form of a report dated 7th June 2022. Reliance is placed on section 23 of the Criminal Appeal Act 1968.

4. The prosecution resists the appeal, and seeks leave to rely on the evidence of Dr Nigel Blackwood, a Professor of Forensic Psychiatry and a Consultant Forensic Psychiatrist. The prosecution disputes any causal link between the PTSD and the index offences. They say that it is too remote to justify any significant discount in the sentence passed. The prosecution do not accept, on the basis of Dr Blackwood's report, that the diagnosis of PTSD was directly linked to the appellant's offending.

5. We have heard this afternoon, *de bene esse* (on a provisional basis so that we could decide whether to admit the evidence) oral evidence from Dr Desautels and Dr Blackwood. We will return to their evidence later.

Relevant background

6. The appellant is now aged 54. He pleaded guilty on 6th August 2018, at a time when he was entitled to full credit for his pleas, to a series of offences of sexual assault of a child aged under 13, sexual activity with a child, and voyeurism. The offences were committed against his two daughters and their cousin. The offending against the cousin took place first in time between 2005 and 2007, when she was aged 10. The offending against his two daughters took place between 2012 until 2017 when they were aged between 11 and 15. The offences took place against his children in their home address and against the cousin in her home.

Brief circumstances of the offending

7. Count 1, which related to the cousin, occurred between 2005 and 2007 when she was aged 10. The appellant put his hand down the back of her tracksuit bottoms into her underwear and touched her bottom.

8. Counts 2 and 3, which related to one of the appellant's daughters, occurred between 2012 and 2014 when she was aged 11 to 12. He touched her breasts over her clothing on at least five occasions (count 2). He also touched her breasts under her clothing on at least five other occasions (count 3).

9. Counts 4 and 5, which related to the same daughter, occurred between 2014 and 2016 when she was aged 13 to 15. He touched her breasts over her clothing (count 4). He also pulled her hand towards his genitals under the bedclothes, sometimes making contact (count

5).

10. Counts 6, 7 and 8 occurred between 2014 and 2017, when the same daughter was aged between 13 and 15. The appellant touched her breasts over her clothing at least five times (count 6). He also touched her breasts under her clothing on at least five occasions (count 7). During the same time period he touched the outside of her vagina at least five times (count 8).

11. Count 9, occurred between 2015 and 2017, when the same daughter was aged 14 to 15. He penetrated her vagina with his finger on at least five occasions.

12. Count 10 occurred between 2014 and 2017, when the same daughter was aged 13 to 15. He touched her bottom on at least five times.

13. Count 11 occurred in January 2017, when the same daughter was aged 15. He touched her breasts over her clothing.

14. Counts 12 and 13 occurred between 2014 and 2016, when she was aged 13 to 15, and between 2015 and 2017 when she was aged between 14 and 16. The appellant committed acts of voyeurism by observing her at least five times when she was naked in the bathroom (through a window or through a hole he had drilled in the door).

15. Counts 14 and 15 occurred between 2012 and 2014, when his second daughter was aged between 11 and 12. The appellant touched her breasts over her clothing at least five times (count 14). He also touched her breasts under her clothing on at least five occasions (count 15).

16. Counts 16 and 17 occurred between 2014 and 2017, when his second daughter was aged

between 13 and 15. The appellant touched her breasts over her clothing at least five times (count 16) and under her clothing on at least five occasions (count 17).

17. Counts 18 and 19 occurred between 2014 and 2016, when the second daughter was aged between 13 and 15, and between 2016 and 2017 when she was aged 15. The appellant committed acts of voyeurism by observing her at least five times when she was naked in the bathroom (through the window or through the hole in the door).

18. In January 2017, the first daughter (then aged 15) told a teacher that her father had been sexually abusing her. As a result both she and her sister were interviewed and they both disclosed that their father had committed a number of sexual assaults against them. The police also spoke to the cousin, who disclosed that the appellant had touched her sexually when she was about 10 years of age.

Sentencing exercise

19. The Victim Personal Statements proved the immense damage which had been caused by the appellant treating the victims as if they were sexual objects when they were growing up.

20. There was a pre-sentence report. No mention was made at the sentencing hearing of post traumatic stress disorder and the legal representatives then acting on behalf of the appellant confirmed that no issue relating to post traumatic stress disorder or mental disorder had been raised with them at the time.

21. The judge sentenced the appellant for the prolonged and frequent sexual abuse of his daughters and their cousin. Each of them had been affected in the ways that the judge had heard and read about. The judge said that the appellant had taken gross advantage of three defenceless children. He had effectively deprived them of their childhood and had taken

away their innocence.

22. None of the complainants had felt able to reveal to anyone what the appellant was doing. The judge understood why they had kept it to themselves for so long. A serious aspect of the case was that the abuse took place frequently, sometimes several times a week. As the first daughter became older, she was subjected to more and more serious physical abuse. Each complainant had struggled with the effect of that. The judge found that the appellant must have realised the likely effect that he would have on each of the victims. He could probably see the effects of it as they grew up, but that did not stop him.

23. There had to be a prison sentence of considerable length. The judge gave maximum credit for the appellant's guilty pleas, which had been tendered at the first available opportunity. The aggravating features were the extreme breach of trust and the location of where the abuse took place.

24. The judge took into account the appellant's mitigating features: these were the appellant's first convictions and in many ways he had led a good life. His lack of convictions, however, had to be considered in light of the fact that his offending went on for several years. The judge accepted the appellant's remorse to some extent. However, he must have known that what he was doing was wrong. The judge then imposed the sentence set out in paragraph 1 above.

Expert evidence

25. As already indicated, no issue of post traumatic stress disorder or its effect was raised at the sentencing hearing. The appellant had, as a matter of history, served in the armed forces from a young age of just about 16 when he joined junior leaders. He had served for nine years, and he had seen service in the first Gulf War. It seems from the expert evidence that

was before us today that the first suggestion that the appellant might have post traumatic stress disorder was raised by a prison psychologist, Dr White.

26. Both Dr Desautels and Dr Blackwood, who gave evidence today, examined the appellant by video link to prison. Dr Desautels said that his findings from his assessment strongly indicated that the appellant was suffering from PTSD. The onset of the disorder seems to have occurred after he left the armed forces, and he seemed to have been suffering from it ever since, including at the time that the offences were committed. At the time that Dr Desautels had seen him, the condition remained untreated, although we heard evidence today that Dr White had successfully treated some symptoms of the PTSD. Dr Desautels said that he did not believe that the post traumatic stress disorder could be deemed to be the cause of the offending behaviour, but he went on:

> "1.3 I believe this diagnosis can be considered as a significant contributing factor.
>
> 1.4 [The appellant] has developed, during his early years, certain strategies to help him cope with adversity; he kept others at a distance and entertained little sympathy for the plight of others. He focused on duty and expected the same from others. These strategies served him well in the army, but were, nevertheless, not sufficient to protect him from trauma.
>
> 1.5 Although these strategies became increasingly maladaptive when he returned to civilian life, they still enabled him to carry on functioning. Keeping the trauma out of his mind put them under considerable strain; to avoid any further demands placed on him by others, he became even more detached and intransigent. This came at a cost as it left him painfully lonely and distressed.
>
> 1.6 Abusing his daughters and niece seems to have been a grossly inappropriate attempt to find some kind of solace, intimacy and connection, and to alleviate his distress while remaining in complete control of the situation."

27. In oral evidence, Dr Desautels explained that he had seen a letter from Dr White who had

treated the appellant in prison. That disclosed that Dr White had relied on a Traumatic Symptom Inventory-2 in order to assess whether there was post traumatic stress disorder. That test itself contained at least some safeguards against malingering. Dr White had not highlighted malingering in his letter and therefore, although Dr Desautels could not say where on the scale of malingering or not malingering the appellant was, all that could be safely said was that there was no evidence of malingering.

28. So far as the issue of Dr Blackwood's failure to find hyperarousal was concerned, Dr Desautels said that that may have been because the appellant had been successfully treated by Dr White in the interim, so that when Dr Blackwood came to examine the appellant, there was no evidence of that particular factor which, it was common ground, was a relevant factor to justify a diagnosis of post traumatic stress disorder.

29. So far as Dr Desautels was concerned, he had been asked to provide a "hypothesis" linked to the PTSD to explain the offending. He considered the PTSD a possible link to the offending. When asked directly, he said that he considered that it was more likely than not that the PTSD was linked to the offending because there was evidence to support it.

30. Dr Blackwood had also produced a report. He gave evidence before us. In his report he noted that Dr Desautels' diagnosis was on the basis of the appellant's self-report and that the appellant had not sought treatment. Dr Blackwood concluded that even if the appellant's experience of traumatic events was truthful, and it is accepted that he had experienced flashbacks and avoided external reminders of the traumatic events, he did not document evidence of a current threat, hyperarousal, increased startled response, or significant functional impairment. Dr Blackwood considered that the appellant did not meet the categorical cut-off for post traumatic stress disorder diagnosis in the ICD-11, which is the World Health Organisation international classification of disease criteria.

31. Dr Blackwood also stated that Dr Desautels' hypothesis that the PTSD was linked to sexual offending more than ten years after leaving the army because it represented an attempt to find some kind of solace, intimacy and connection was no more than a hypothesis and was not even a suggestion advanced by the appellant himself, who recognised the sexual motivation for his behaviour. Dr Blackwood stated that the clearer motivation was "paraphilic motivation" (a persistent and recurrent sexual interest and behaviours of marked intensity).

32. In cross-examination, Dr Blackwood accepted that one reason why he did not find evidence of hyperarousal at the time could have been because there had been an improvement between 2022 and 2023. He was able to say that on the basis of his questioning of the appellant, he could not identify any evidence of hyperarousal or hypersensitivity, either at the time of departure from the army, at the time of the offending, or at the current time. Dr Blackwood did not consider that the appellant merited the diagnosis of post traumatic stress disorder, although he identified that some symptoms along the way to such a diagnosis were present.

Relevant legal principles

33. Fresh evidence may be admitted, pursuant to section 23(2) of the Criminal Appeal Act 1968. The court is directed to have regard to: (a) whether the evidence appears to the court to be capable of belief; (b) whether it appears to the court that the evidence may afford any ground for allowing the appeal; (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

34. There is current guidance in the Sentencing Council's Guideline on Sentencing Offenders with Mental Disorders, Developmental Disorders or Neurological Impairments. It was common ground that although these did not apply at the time of sentencing hearing, they set out pre-existing relevant principles.

35. The guidelines remind sentencers that no adverse inference should necessarily be drawn if an offender had not previously either been formally diagnosed or was willing to disclose an impairment or disorder. At paragraphs 11 and 12 of the guidance, it is noted that:

> "The sentencer should make an initial assessment of culpability in accordance with any relevant offence-specific guideline, and should then consider whether culpability was reduced by reason of the impairment or disorder.
>
> Culpability will only be reduced if there is sufficient connection between the offender's impairment or disorder and the offending behaviour.
>
> In some cases, the impairment or disorder may mean that culpability is significantly reduced. In other cases, the impairment or disorder may have no relevance to culpability. A careful analysis of all the circumstances of the case and all relevant materials is therefore required."

Conclusions on the fresh evidence

36. It is necessary to make our findings on the expert evidence, because this will inform whether we formally admit it.

37. We are prepared to accept that although the appellant does not have all the criteria to satisfy a full diagnosis of post traumatic stress disorder at the current time, there are elements of trauma, flashback and avoidance behaviour symptomatic of post traumatic stress disorder. Nothing has been said to cause us to doubt that at the time when Dr White saw the appellant and indeed Dr Desautels first saw the appellant, there was at that time a diagnosis of post

traumatic stress disorder that could be made.

38. However, the critical question for us is whether the appellant's culpability for his offending was reduced by post traumatic stress disorder. We are sure that it was not. First, there was a separation of time between the post traumatic stress disorder and the commencement of offending. That may not be a complete answer in every case, but it is relevant in this case when the offending started at the time when the three children had crossed the age of 10, which was the age of the children which the appellant showed sexual interest.

39. Secondly, the appellant does not himself link any symptoms, such as post traumatic stress disorder, his avoidance, or any requirement for intimacy to his offending. Not all offenders will have insight into the reasons for their offending. There was, however, nothing suggested by either Dr Desautels or by Dr Blackwood to suggest that the appellant himself was incapable of making the link if there had been such a link.

40. Thirdly, the clear evidence from the appellant, as reported to Dr Blackwood, was that his offending was driven by his sexual motivation and interest in young girls aged 10 to 15. In those circumstances, we accept the unequivocal evidence of Dr Blackwood that there was no link between the offending and the post traumatic stress disorder.

41. It is only fair to Dr Desautels to record that in his written report, he had identified to PTSD only as a possibility, and it was in the course of the hearing this afternoon, in answer to a question, said that he thought it more likely than not. Be all that as it may, we are sure that Dr Blackwood was right to identify that there was no link. In these circumstances we will not formally admit the fresh evidence because it does not form a ground for allowing the appeal.

42. That leaves two matters to be considered. The first is whether there is anything to be gained by an adjournment, even at this late stage, to see whether obtaining the report from the prison psychologist Dr White could assist. We have considered that issue carefully, but there is nothing in the material that was said to have been obtained by Dr White that would have assisted with the issue of causation of offending. Any adjournment to see if anything might assist would have been wholly speculative.

43. The second point was what Mr Stevens had referred to as a fallback submission, to the effect that it is possible that even if there is no link, the existence of post-traumatic stress disorder might have provided mitigation which was unknown to the judge.

44. We consider that, although we are satisfied that post traumatic stress disorder existed at the time identified by Dr White and Dr Desautels, the evidence is less clear about whether post traumatic stress disorder existed at the time of the offending. But even accepting its existence, we cannot see that that would have been a basis for any substantial mitigation for the appellant in these circumstances. This was serious sexual offending carried out for sexual satisfaction and gratification by a father against his daughters between the ages of 11 and 15, and against their cousin when she was aged 10. The motivation was sexual interest. That was the beginning, and in many respects, the end of it.

Victim surcharge

45. We said that we would return to the order for the Victim Surcharge. In a helpful note, the Registrar has identified that the Victim Surcharge Order appears to be unlawful. A surcharge order under the Criminal Justice Act 2003 (Surcharge) Order 2012 only applies where all of the offending before the court was committed on or after 1st October 2012. As is apparent from the details of the offences, the present offences span the period before the coming into force of the surcharge provisions.

46. In any such case where there is a straddling of the commencement date, the provisions least punitive to the offender should apply. For those reasons we are satisfied that the Victim Surcharge Order was unlawful and we quash it.

47. In all other respects, the appeal against sentence is dismissed.

48. We are grateful to Mr Stevens and Miss Gates for their very helpful written and oral submissions.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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